Supreme Court, U.S.
FILED
NOV 13 2001
CLERK

(3)

No. 01-351

In The

Supreme Court of the United States

SHERYL KNIGHT and STEVE KNIGHT,

Petitioners,

v.

WILLIAM C. BUCKNAM, M.D.,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

AMENDED REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the legislative enactment and judicial enforcement of Michigan's statutory physician-patient privilege, M.C.L. § 600.2157, deprived Dr. Bucknam [respondent] of his Due Process rights in a manner that justified dismissal of petitioners' claims in this case.

2. Whether the Michigan Court of Appeals deprived petitioners of their constitutional rights to due process of law and a jury trial when the court justified a grant of summary judgment by applying its own findings of fact to a standard of proof different than the standard imposed by the Washtenaw County Circuit Court and by weighing testimonial evidence, without remanding the case for factual determination.

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ARGUMENT IN REPLY TO BRIEF IN OPPOSITION

This petition for a writ of certiorari raises two constitutional questions of broad importance. The issues have been preserved properly, and they deserve the considered and deliberative review of this Court. Several of the points raised in respondent's brief in opposition are simply incorrect, and other points actually underscore the need for review of the questions presented in this petition.

1. Respondent mistakenly asserts that "[p]etitioners contend that Michigan's physician-patient privilege is unconstitutional." Brief in Opposition, p. 12. To the contrary, petitioners have always *challenged* the ruling that the physician-patient privilege worked a deprivation of respondent's due process rights under the Fourteenth Amendment sufficient to justify the dismissal of petitioners' claims. The question presented here by petitioners asks:

> 1. Whether the legislative enactment and judicial enforcement of Michigan's statutory physician-patient privilege, M.C.L. § 600.2157, deprived Dr. Bucknam of his Due Process rights in a manner that justified dismissal of petitioners' claims in this case.

Petitioners contend that the answer to this question must be "no." Petitioners do not agree that respondent suffered a deprivation of his Fourteenth Amendment rights, and petitioners do not agree that the dismissal of their claims would be an appropriate remedy if there were a due process deprivation.

Respondent also asserts that petitioners have failed to present their challenge at previous stages of these proceedings in accordance with *Adams v. Robertson*, 520 U.S. 83 (1997). Brief in Opposition, p. 9. Contrary to the assertion of respondent, petitioners have challenged this decision at length at every stage of the proceedings, and a summary of the previous challenges containing references to the record was included with the petition. Petition, pp. 12-16.

This constitutional issue was argued and decided at the proceedings of the trial court. *See* Petition, App. B, pp. 10a-16a. Petitioners then challenged this constitutional interpretation at length in their Appellant's Brief presented to the Michigan Court of Appeals. Petitioners argued that the trial court erred first in finding that there was a deprivation of respondent's due process rights on the grounds that a private individual's exercise of the physician-patient privilege was insufficient to satisfy the "state action" requirement underlying any due process claim. *See* petitioners' Appellant's Brief (on appeal to the Michigan Court of Appeals), pp. 34-39.

Petitioners further argued that respondent had waived his right to assert a claim that his constitutional rights had been violated when he supported the assertion of the physician-patient privilege against himself. *See* petitioners' Appellant's Brief (on appeal to the Michigan Court of Appeals), pp. 39-41; *D.H. Overmyer Co. v. Frick*, 405 U.S. 174, 185-86 (1972). Respondent opposed petitioners' motion that would have made respondent's records available for trial, but respondent then claimed that the denial of petitioners' motion was the state action that deprived respondent of his due process rights. By

refusing to request disclosure of these records, respondent waived his right to claim that lack of disclosure deprived him of his constitutional rights.

Petitioners also argued that, even if there was a due process deprivation present, the remedy of dismissing petitioners' claims was inappropriate. *See* petitioners' Appellant's Brief (on appeal to the Michigan Court of Appeals), pp. 32-34. After all, petitioners did not do anything to deprive respondent of access to the medical records at issue. Because the due process claim was predicated on a failure to disclose medical records, the proper remedy for a deprivation of those rights would be some form of disclosure, not dismissal of petitioners' claims.

These arguments were again presented at length to the Michigan Supreme Court. *See* petitioners' Application for Leave to Appeal (to the Michigan Supreme Court), pp. 49-63. Consequently, there can be no doubt that the Michigan Court of Appeals and the Michigan Supreme Court had "a fair opportunity to address the federal question that is sought to be presented here." *Adams v. Robertson*, 520 U.S. 83, 87 (1997), quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Finally, it should be noted that respondent claims on one hand that "[a]pplication of the physician-patient privilege in this case comports with this Court's reasoning in *Jaffee*," referring to *Jaffee v. Redmond*, 518 U.S. 1 (1996). Brief in Opposition, pp. 16-17. Yet, on another hand, respondent claims that the application of the physician-patient privilege was a state action that deprived him of his due process rights under the Fourteenth Amendment. Brief in Opposition, pp. 18-19. It is precisely

this contradiction that requires deliberative review by this Court. We contend that the physician-patient privilege contained in M.C.L. § 600.2157 did not work a deprivation of respondent's Fourteenth Amendment rights in this case, and even if there were a deprivation, we contend that the dismissal of petitioners' claims was not an appropriate remedy.

Petitioners Sheryl and Steve Knight certainly stand aggrieved by the decision of the trial court to dismiss their claims against respondent William C. Bucknam, M.D. The sole basis for this dismissal was the ruling of the trial court that the legislative enactment and judicial enforcement of the statutory physician-patient privilege were state actions that deprived respondent of his Fourteenth Amendment rights. Petitioners have challenged this ruling at every stage of the proceedings, and the questions presented for review have been properly preserved.

2. Respondent claims that the second issue presented by petitioners for review should be rejected because the issue involves facts. Brief in Opposition, pp. 2, 21. However, the question presented by petitioners actually addresses the constitutional limitations on the power of judges to decide facts in the context of a summary judgment motion. We contend that the Michigan Court of Appeals deprived petitioners of their constitutional rights to due process of law and a jury trial when the court justified a grant of summary judgment by applying its own findings of fact to a standard of proof different than the standard imposed by the trial court and by weighing testimonial evidence, without remanding the case for factual determination.

This Court has not shied away from cases delimiting the power of courts to grant summary judgment. *See, e.g., Kodak v. Image Technical Svcs.*, 504 U.S. 451 (1992); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Unlike previous cases, however, this case addresses the power of an appellate court to grant summary disposition by deciding facts. Respondent argues that, because "no assessment of the facts had been undertaken by the lower court," the Michigan Court of Appeals was empowered to make findings regarding the facts of the case in the course of *de novo* review. Brief in Response, p. 23. Petitioners disagree with this understanding of the scope of *de novo* review, which would essentially convert petitioners' right to a jury trial into a nullity.

This issue is raised with great clarity in this case particularly because the facts presented by petitioners were the factual admissions of respondent himself. As just one example, respondent claims that we do not have "the benefit of having reviewed one page of the 12 year history of records that exist between Mr. Mueller and Dr. Bucknam," leaving us to rely on "speculation and conjecture" regarding the facts of the case. Brief in Response, p. 29. But we actually do have Dr. Bucknam's signed report regarding Mr. Mueller, which was submitted to each of the previous courts reviewing this matter, and which is attached to the petition in this case as Appendix I. Petition, pp. 27a-32a. This report by Dr. Bucknam discusses the history and severe symptoms of Mr. Mueller's manic

condition, Dr. Bucknam's diagnoses, the medications prescribed, and the fact that the condition led to psychiatric hospitalization for a two-week period beginning on the day of the accident at issue in this case. Petition, App. I, pp. 29a-31a. We have no reason to believe that Dr. Bucknam's other records would contradict this report, and the report is signed by Dr. Bucknam just below a provision that reads: "I certify that the statements contained in this statement of examination are true to the best of my knowledge and belief." Petition, App. I, p. 31a. We contend that petitioners could rely on this report, as well as the sworn testimony of Dr. Bucknam and Mr. Mueller, to demonstrate the knowledge Dr. Bucknam had regarding Mr. Mueller's condition when Dr. Bucknam permitted Mr. Mueller to drive himself to the hospital for emergency psychiatric treatment of a condition characterized by delusions. *See* Petition, pp. 4-9, 21-27. Nevertheless, respondent claims that we should view these factual admissions as nothing more than "speculation and conjecture." *See* Brief in Response, p. 29.

As petitioners immediately argued in their Motion for Rehearing, the appellate court's actions in determining facts and weighing evidence resulted in an improper taking of factual issues from the jury and deprived petitioners of their constitutional rights to due process and a jury trial under the Michigan Constitution, the Fifth Amendment, the Seventh Amendment, and the Fourteenth Amendment. Motion for Rehearing (to the Michigan Court of Appeals), pp. 6-10. As noted in the Petition, we also presented these arguments to the Michigan Supreme Court. Application for Leave (to the Michigan Supreme Court), pp. 44-49; Motion for Reconsideration

(to the Michigan Supreme Court), pp. 8-10; Petition, pp. 15-16. In summarizing the issues presented by the case and the reasons for granting review, for example, petitioners stated:

- **Under what circumstances is the Court of Appeals free to weigh the unchallenged testimony of a witness and construe the inferences from that testimony against the nonmoving party in a motion for summary disposition?** Plaintiffs submitted the affidavit testimony of a board-certified expert psychiatrist who had reviewed the evidence admitted in the case, including the testimony and party admissions of Dr. Bucknam, and stated that Dr. Bucknam was negligent in letting Mr. Mueller drive under the circumstances. Defendant did not challenge the admissibility of the expert psychiatrist's testimony at trial or on appeal. Nevertheless, the Court of Appeals weighed the expert psychiatrist's testimony, and summarily determining that it was "speculative," refused to construe the inferences of this testimony in favor of the Knights. Is this a violation of Plaintiffs' constitutional right to a jury trial?

- **When is the Court of Appeals empowered to overrule the unchallenged rulings of a trial court without remanding the case for further trial court proceedings?** The trial court found evidence of negligence, which was not controverted by any genuine issue of material fact, and Defendant did not appeal that finding. The Court of Appeals reversed that finding. Similarly, the trial court specifically ruled that this was not a malpractice case, and Defendants did not challenge or

> appeal that ruling. Consequently, Plaintiffs did not need to present evidence proving malpractice in trial court proceedings. The Court of Appeals later reversed the ruling of the trial court without appeal, imposed a malpractice burden of proof, and did not give Plaintiffs an opportunity to return to the trial court to address this burden of proof. Is this a violation of Plaintiffs' rights to Due Process and a jury trial?

Petitioners' Application for Leave to Appeal (to the Michigan Supreme Court), pp. 8-9.

Petitioners then made substantial arguments about these issues, concluding in part: "To uphold this incorrect ruling by the Court of Appeals would clearly violate the Knights' right to a jury trial." Petitioners' Application for Leave to Appeal (to the Michigan Supreme Court), pp. 34-48; 47 (*citing*, Michigan Constitution, Article I, § 14; United States Constitution, Seventh Amendment).

Contrary to respondent's claims, Petitioners have continually presented the lower courts with "a fair opportunity to address the federal question that is sought to be presented here" in accordance with *Adams. Adams v. Robertson*, 520 U.S. 83 (1997), quoting *Webb v. Webb*, 451 U.S. 493 (1981).

CONCLUSION

This case presents important questions testing both the constitutionality of Michigan's statutory physician-patient privilege and the constitutionality of an appellate court's power to render summary judgment by determining facts. Petitioners respectfully request this Honorable Court to grant the writ so that these issues may be reviewed.

Respectfully submitted,

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November, 2001